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SUPREME COURT

24825 BLANKENBAKER v. STATE. Clay County. *Reserved. Per Curiam.* May 15, 1929.

The appellant was convicted of direct contempt of court. In case of direct contempt the Supreme Court will take as true the statement entered of record by the lower court of the matter constituting the contempt. The court concludes that the record discloses no contempt of court, and "when there is no legal evidence to sustain a conviction for contempt of court, the conviction is contrary to law." The full opinion should be read to be understood and appreciated.

25231 BURNETT v. STATE. Sullivan County. *Reversed.* Gemmill, J. Martin, C. J., concurs. May 14, 1929.

Appellant was prosecuted and convicted on the charge of transporting intoxicating liquor in an automobile. It was error to overrule the motion to quash. Since, under the statute upon which the indictment was based, it is possible to lawfully transport liquor, it is necessary to characterize the act as unlawful, it being the intention of the legislature to make only the unlawful transportation of intoxicating liquor in an automobile or other vehicle a criminal offense under this particular statute. Where a criminal statute is not to receive construction as broad as the language used would seem to warrant, but is to be narrowed by construction, contrary to the general rule an indictment drawn in the language of the statute is not sufficient, and the indictment must be drawn so as to effectuate the intention of the legislature, by which the statute was framed. It was not error to overrule appellant's motion to suppress the evidence which was obtained by searching the automobile of appellant where the searching officer had reasonable and probable cause for believing that the automobile contained intoxicating liquor.

25739 THE FARMERS DEPOSIT BANK v. STATE EX REL. Blackford County. Cause transferred to Appellate Court. Myers, J. May 3, 1929.

Suit by the State of Indiana, on relation of bank commissioner, for the appointment of a receiver for appellant bank on the ground that the bank was insolvent or was probably insolvent. In suit for the appointment of a receiver on ground of bank's insolvency under Burns' Ann. Stats. for 1926, Secs. 259 and 256 *et seq.*, the stockholders, depositors and the receivers are not necessary parties to bank's appeal from judgment appointing a receiver, where at the time of judgment and perfecting of appeal the assets of the bank were in possession of the commissioner; although under Sec. 3965, Burns' 1926, notice of application for appointment of a receiver should be given to the stockholders and depositors. The judgment below being final and not interlocutory, and the jurisdiction of the appeal on its merit being in the appellate court, the cause is transferred.

25761 FREAS v. CUSTER. Marion County. *Affirmed.* Travis, J. (Transferred from Appellate Court of Indiana, under Sec. 1357, cl. 2, Burns 1926, Acts 1901, p. 565.) May 15, 1929.

This was an action by appellee to recover for services rendered as a licensed physician. It is insisted by the appellant that the complaint is upon an implied contract, and that the finding is upon evidence which proves an express oral contract and, consequently that this evidence constitutes a variance from the complaint which amounts to a failure of proof. See opinion for full discussion of the allegations of the complaint and the evidence introduced thereunder.

25448 GREENE v. HOLMES. Floyd County. *Reversed.* Willoughby, J. Martin, C. J., and Gemmill, J., dissent with an opinion. May 4, 1929.

The issue involved was whether the plaintiff was entitled to have an interlocutory mandatory temporary injunction issued commanding the defendant immediately and forthwith to provide for holding an election to decide whether or not the city manager plan of government should be adopted. It was error to grant the injunction because it does not appear that the plaintiff had any personal interest in the litigation, but only the interest common to all the public. No emergency is shown for injunctive relief and the statute expressly provides the legal remedy of mandamus.

24932 LINDLEY v. STATE. Delaware County. *Affirmed.* Myers, J. May 28, 1929.

Appellant and another convicted on the charge of unlawful transportation of intoxicating liquor in an automobile. Appellant relies upon the alleged errors of the trial court in refusing to give a tendered instruction and in giving, on its own motion, two separate instructions. The tendered instruction was properly refused. The two instructions given by the court on its own motion were open to objection but in view of the evidence no injury could have resulted to the appellant and consequently no reversible error.

24898 PARTLOW v. STATE. Marion County. *Affirmed.* Willoughby, J. May 28, 1929.

The appellant was convicted on the charge of unlawfully and feloniously buying, concealing and aiding in the concealment of stolen property. An indictment or information is sufficient if the charge is made in the language of the statute, and "an averment in an indictment for receiving stolen goods, that defendant feloniously received the goods that had been stolen is equivalent to charging that the defendant received the goods which at the time of the receiving were still under the larcenous taking, and the defendant knew it."

25474 POLLARD v. STATE. Shelby County. *Affirmed.* Gemmill, C. J. May 29, 1929.

The appellant was found guilty of murder in the first degree and was sentenced to the Indiana State Prison for life. Although the prosecuting attorney made an improper comment on appellant's failure to testify, the

misconduct was not of such a character as to require the withdrawal from the jury of the submission of the cause and the discharge of the jury in view of the fact that the court sufficiently protected the interests of the defendant by properly instructing and cautioning the jury. Granting the opposing counsel used improper argument this could not be reached by making an objection and taking an exception to the statements of the opposing counsel, but the exception must be to the ruling of the court upon an objection to the use of the argument and not to the argument. A party cannot complain of an instruction which follows the statute if he fails to request that a fuller and more complete instruction be given.

25527 RITENOUR *v.* HESS ET AL. Warren County. *Affirmed.* Martin, J. May 29, 1929.

This is an appeal from a judgment of the Warren circuit court appointing the appellee guardian of an insane person and adjudging that appellant was not entitled to act as guardian. While it is true that no statutory authority exists for transferring a pending guardianship of an insane person from one county to another, it is also true that there is no express statutory inhibition against it; and the appellant having invoked the jurisdiction of the Tippecanoe circuit court to transfer the guardianship from the Warren circuit court she is estopped from questioning it now, the action of the Tippecanoe circuit court in administering the estate being merely voidable and not void. The Tippecanoe circuit court having removed the appellant from the guardianship the appellant could not have a review of that judgment or secure relief from the same by a petition granted in the Warren circuit court, the two courts being of co-ordinate jurisdiction.

25445 SARLIS V. STATE EX REL. TRIMBLE ET AL. Vanderburgh County. *Reversed.* Martin, C. J. April 26, 1929.

Action in mandate to compel city clerk to amend a certificate of his inability to determine, within the time allowed by law, whether a petition for submission of the question of adopting the city manager plan to the voters was signed by a sufficient number of qualified electors. The requirement of the statute is that the clerk determine whether the petition is signed by a *sufficient number of qualified voters,* not that he determine whether it is signed by the proper number of persons *who state therein that they are voters;* and the petition is not *prima facie* evidence that the signers are electors. (But see Sec. 3, Ch. 60, Acts 1929.) Judgment for relators was not sustained by sufficient evidence. See opinion for discussion of the constitutionality of the city manager law.

25772 WALL V. CITY OF MUNCIE ET AL. (Transferred from Appellate Court under Sec. 1357, Cl. 2, Burns 1926, Acts 1901, p. 565.) *Appeal dismissed.* Travis, J. May 28, 1929.

This is a suit in equity to annul and set aside the action of the Board of Public Works of appellee city; to annul the assessments; and to perpetually enjoin collection of the assessments, etc. Although a finding of the trial court and conclusion of law upon such finding would have supported

perpetual injunction, yet the decree of judgment actually rendered was not final and being in effect interlocutory is a temporary injunction and the appeal not having been taken within the statutory period of 30 days after the date on which the decree was rendered, the appeal is dismissed.

24605 WHEELER v. CITY OF INDIANAPOLIS. Marion County. *Reversed.* Gemmill, J. May 16, 1929.

This was a proceeding under Sec. 10721, Burns 1926, for the purpose of constructing a certain drainage system. The court only considers the alleged error of the trial court in overruling the motion for a change of venue. The statutory provision regulating changes of venue are applicable to drainage cases except where the statutes specifically deny such application. The statute which governs in this proceeding does not deny a right of change of venue. The trial court erred in refusing to grant a change of venue.

25571 WILLIAMS v. STATE. Ripley County. *Affirmed.* Martin, J. Myers, J., concurs with an opinion. Willoughby and Travis, JJ., concur with concurring opinion. May 29, 1929.

Appellant was convicted on the charge of violation of the statute which makes it "unlawful to possess, control, use or assist in using any distilling apparatus." The constitutional inhibition against unreasonable searches and seizures does not make necessary the obtaining of a search warrant to enable officers to search fields, woods, or land which is some distance from a house or dwelling.

APPELLATE COURT

13659 ARNOLD v. STATE. Vanderburgh County. *Affirmed.* Remy, J. May 14, 1929.

Appellant was convicted of maintaining a liquor nuisance. The only reason presented for new trial was the alleged error in the admission of certain evidence claimed to have been procured under an invalid search warrant. The court says it is a well settled general rule of practice that objection to the admissibility of evidence, unless timely made, is waived, and that the admissibility of evidence ascertained by virtue of an illegal search warrant is no exception to the rule; and that the reason for the rule is that the court should not pause in the midst of the trial to determine a collateral issue. On the authority of *Hantz v. State*, the objection to the evidence was not timely made.

13410 BARTLES v. CITY OF GARRETT. Steuben County. *Affirmed.* Lockyear, J. May 16, 1929.

This is an action by appellant against the appellee city to recover damages for breach of a contract for the erection of a certain public building known as a Community Building. A demurrer to the complaint was sustained by the trial court. The court concludes that the mayor and common council of the appellee city do not have authority to enter into such a contract and the trial court did not err in sustaining the demurrer.

13660 BAUGH v. STATE. Monroe County. *Affirmed.* Enloe, C. J. May 7, 1929.

The only question presented is the sufficiency of the evidence to sustain the verdict of the jury finding the appellant guilty of possessing and selling intoxicating liquor. In accordance with the rule that the "court will consider only the evidence which tends to prove the defendant guilty, and if there is legal evidence on every essential fact necessary to establish the crime charged, the overruling of a motion for a new trial must be approved," the court finds no error.

13433 BENNETT v. DOWNEY. Marion County. *Affirmed.* Nichols, J. May 17, 1929.

Affirmed on authority of *Dorbecker v. Downey*, 163 N. E. 535.

13630 BOSTON v. STATE. Vanderburgh County. *Affirmed.* Enloe, C. J. May 14, 1929.

The chief error relied upon was the action of the trial court in admitting certain evidence over the objections of appellant, appellant's objection being based upon the alleged invalidity of the search warrant under which the evidence was seized. On the authority of *Hantz v. State* it is held that the trial court did not err in the ruling.

12341 BOUGHER, EXTX v. THE STRAUSS BROTHERS CO. ET AL. Whitley County. *Affirmed.* Nichols, J. May 10, 1929.

An action for damages for unlawfully holding over the possession of certain real estate after the expiration of the lease. Before any error can be predicated upon giving or refusing instructions, it must affirmatively appear that all the instructions given are in the record, and not merely those tendered. Also before the refusal to give tendered instructions can be reviewed the record must also show that there was a tender, and a request that they be given, before the commencement of the argument.

13554 BOYD v. CHASE, ET AL. Industrial Board. Reversed. Remy, J. May 28, 1929.

This case presents the question whether, under the facts as stated by the Industrial Board, the death of appellant's employee was the result of an accident which arose out of and in the course of his employment. The accident occurred while the employee was riding in the automobile of a fellow employee on the way to work. The evidence was insufficient to show implied contract by the terms of which the deceased employee was, at the time in question, to be taken to work in the automobile operated by his fellow-employee.

13635 CHANDLER v. STATE. Delaware County. *Affirmed.* Remy, J. May 9, 1929.

Appellant was convicted on the charge of having intoxicating liquor in his possession. The evidence was sufficient to sustain the verdict and since it does not appear that appellant interposed any objection to the evidence procured by the search of appellant's premises, the act of the

court in overruling the motion to quash the search warrant and suppress the evidence, if error, was waived.

13331 CHICAGO & EASTERN ILLINOIS RY. CO. v. LATTA. Sullivan County. *Affirmed.* Lockyear, J. May 14, 1929.

An action by the appellee to recover damages for personal injuries received as the result of a collision between the defendant's train and a milk truck which was being driven by the appellee. In support of its motion for a new trial the appellants claim the verdict of the jury was not sustained by sufficient evidence and was contrary to law and that the damages assessed were excessive. There was sufficient evidence to support the verdict and the damages assessed by the jury are not excessive.

13587 CHOWNING v. STATE. Delaware County. *Rehearing Denied.* On Petition for Rehearing Remy, J. May 31, 1929.

After setting out the substance of the evidence, "in fairness to appellant," the court concludes that "with the evidence of the five unimpeached witnesses of the State before them, the members of the jury could not, without disregarding their oaths, have done otherwise than find appellant guilty."

13350 DAVIES v. BIDDLE ET AL. Harrison County. *Affirmed.* Nichols, J. May 17, 1929.

Action by appellant again appellee for the possession of certain real estate and for damages for the unlawful possession thereof. Where appellee is claiming title to real estate by reason of adverse possession thereof for over twenty years it is not necessary that she show that she had any color of title in order to establish title. Adverse possession for the statutory period based upon the parol gift of land is sufficient to give title. It was not error to refuse to instruct the jury that before the appellee could recover on her cross-complaint she had the burden of showing that she entered into a written contract for the real estate involved.

13584 DEMUINCK v. STATE. St. Joseph County. On Petition for Rehearing. *Rehearing denied.* McMahan, C. J. May 31, 1929.

The action of the Supreme Court in transferring the cause to the Appellate Court is conclusive on the matter of the constitutionality of the Act of March 12, 1929, Ch. 123, Acts 1929, p. 429.

13677 DUVALL v. STATE. Marion County. *Affirmed.* McMahan, C. H. May 28, 1929.

Appellant was tried and convicted under an affidavit charging violation of the Corrupt Practices statute, the punishment being fixed at a fine of $1000 and imprisonment in the county jail for 90 days. The jury also found that he shall be ineligible to any public office for a period of four years from November 2, 1925. See opinion for full discussion of what constitutes an unlawful promise within the statute and for a discussion of the evidence. Judgment affirmed in so far as the fine and imprisonment are concerned and reversed so far as the period of ineligibility is concerned,

the latter part of the judgment being treated as surplusage, since the statute fixed the period of inelibigility and it was not in the power of the jury to add to or detract from that period.

13661 EDINGTON v. STATE. Lawrence County. *Affirmed.* Lockyear, J. May 16, 1929.

The appellant is charged with unlawfully possessing intoxicating liquor. Motion to quash the affidavit was properly overruled, since it did not specifically set out statutory ground for quashing. There was no error in overruling appellant's motion for a new trial.

13706 EICHOFF v. STATE. Vanderburgh County. *Affirmed.* Enloe, C. J. May 10, 1929.

Appellant was convicted on the charge of unlawful possession of intoxicating liquor. The only matters presented on appeal were rulings of the court objecting to their motion to exclude certain testimony. On the authority of *Hantz v. State,* — Ind. App. —, (this term) it is held that the question as to the legality of the search was not timely made and that the trial court did not err in the matters of which complaint was made.

13752 THE FARMERS DEPOSIT BANK v. STATE EX REL. Blackford County. *Reversed.* Enloe, C. J. May 9, 1929.

This is an action by the state of Indiana on relation of a state bank commissioner asking for a receiver for the appellant bank on the ground that the bank was insolvent or probably insolvent. The appellant's motion for change of venue was overruled, a hearing had and a receiver appointed, and an appeal prosecuted to the Supreme Court, upon the theory the order appealed from was "interlocutory." The Supreme Court found the judgment appealed from was a final judgment and transferred it to the Appellate Court for consideration upon the merits. The appellant having properly set forth affidavit showing statutory cause, the court erred in denying appellant change of venue, the statute being mandatory.

13650 FOSTER v. STATE. Vanderburgh County. *Affirmed.* Enloe, C. J. May 16, 1929.

The appellant was unlawfully convicted of having in his possession certain intoxicating liquor. It was not error to overrule an objection to the introduction of evidence based upon the alleged invalidity of the search warrant where the appellant with full knowledge of all the facts of the seizure failed to "move to suppress" before entering upon the trial upon the merits. *(Hantz v. State.)*

13267 THE CITY OF FRANKLIN v. THE GRAHAM REALTY CO. Johnson County. *Appeal dismissed.* Nichols, J. May 29, 1929.

Appellant city attempts an appeal from the judgment of the trial court which reduced an assessment against appellees' property on the authority of *City of Peru v. Kreutzer,* 86 Ind. App. 420, and *McDorman v. City,* 158 N. E. 257. The appellant has the right of appeal only for the

purpose of presenting the question of the trial court's jurisdiction for the purpose of setting aside the judgment as void. And since the appellant depends upon the trial court's alleged error in overruling its demurrer to the complaint, and since the only ground which appellant has stated is that the complaint does not state facts sufficient to constitute a cause of action, there is no question as to the jurisdiction of the court presented.

13628 GOEBEL v. STATE. Vanderburgh County. *Affirmed.* Enloe, C. J. May 15, 1929.

The appellant was tried and convicted on the charge of unlawfully having in his possession a still used in the manufacture of intoxicating liquor. On the authority of *Hantz v. State*, it is held that the trial court did not err in the rulings of which complaint is made.

13657 GOFF v. STATE. Clinton County. *Affirmed.* McMahan, P. J. May 9, 1929.

Appellant was convicted of unlawful possession of intoxicating liquor. The evidence was sufficient to sustain the verdict and the verdict is not contrary to law and the instruction dealing with circumstantial evidence was not open to objection.

13420 CITY OF GOSHEN v. SMITH. Kosciusko Co. *Affirmed.* Per Curiam. May 17, 1929. *Per Curiam.*

13609 HANTZ ET AL. v. STATE. St. Joseph County. *Affirmed.* McMahan, P. J. May 8, 1929.

Appellants had been convicted on three counts charging violation of the prohibition law. The chief question presented is the overruling of a motion to suppress evidence. The court says that a motion to suppress evidence, alleged to have been illegally obtained, must be made timely, and the failure to make the motion timely waives the right to object. Since the appellants were present when the evidence was seized and since there is no showing in the record that appellants were not advised before the trial of the defect in the search warrant, and since no reason is given for not filing a motion before trial to suppress the evidence ascertained by the search, the court holds that the question of the legality of the search was not timely made when made for the first time after proceeding to trial on the merits.

13658 HEADLEE v. STATE. Rush County *Appeal dismissed.* Neal, J. May 9, 1929.

The transcript not being filed within 60 days after the appeal was taken the appeal is dismissed on the authority of *Dudley v. State*, 161 N. E. 1.

13329 INDIANA INVESTMENT & SECURITIES CO. v. ZIMMERMAN, ET AL. Dekalb County. *Affirmed.* Nichols, J. May 10, 1929.

Action in replevin by appellant to recover the possession of a certain automobile from appellees. The automobile in question was seized while being

used in the transportation of intoxicating liquor, and after advertisement was by order of the court sold to one of the appellees, the appellant claiming an interest in the automobile under a conditional sales contract. In order for appellant to show that it is entitled to the immediate possession of the property in controversy, which is necessary to recover in a replevin action, it must show it was in good faith the owner of the property, and that it had no knowledge that it was being used in violation of law. Since it nowhere appears in appellant's brief that appellant had no knowledge of the use of the automobile in violation of the law it is not entitled to recover.

13637 ISABEL v. STATE. Monroe County. *Affirmed.* Lockyear, J. May 16, 1929.

Appellant convicted upon the charge of assault and battery with intent to kill. While the evidence was conflicting, it is sufficient to sustain the verdict. There was no reversible error in the giving of instructions.

13632 KAPPES v. STATE. Franklin County. *Affirmed.* McMahan, P. J. May 16, 1929.

Appellant was convicted on the charge of unlawfully selling intoxicating liquor. It was error to overrule an application for continuance based upon the absence of a witness when there was no showing that the testimony which the absent witness would give was competent and properly admissible. There was no reversible error in the giving of instructions although one instruction was technically inaccurate. The question of alleged misconduct of the trial judge is not presented since the record fails to show that any objection was made or that any exception was taken to the conduct of the judge.

13300 KAUFMAN v. AMERICAN SURETY COMPANY ET AL. Marion County. *Affirmed.* Nichols, J. May 29, 1929.

The appellee surety company as surety for an employee of the appellee steel company had paid the steel company for loss caused by dishonesty of the employee. This is an action by the appellees to recover from appellant on the theory that the appellant colluded with the employee to convert property of the appellee steel company. While it is true that when a crime is charged, whether it be in a civil or a criminal case, the same presumption of innocence attaches in favor of the party assailed and while the jury should scrutinize the evidence with greater caution before coming to a conclusion in favor of guilt, yet in civil issues the result should follow the *preponderance* of evidence, even though the result imputes a crime.

13676 LINZIE v. STATE. Marion County. *Affirmed.* Lockyear, J. May 10, 1929.

The appellant was convicted under an affidavit charging the crime of grand larceny. The affidavit is sufficient and the proof describes the property with sufficient certainty, and the verdict of the jury is sustained by the evidence and is not contrary to law.

13316 LUCKADO v. STATE. Spencer County. *Affirmed.* Neal, J. May 29, 1929.

Appellant convicted on the charge of assault and battery with intent to kill. The evidence is sufficient and the verdict is not contrary to law.

13293 LYONS BANK & TRUST CO. v. TUXEDO STATE BANK ET AL. Monroe County. *Reversed.* Lockyear, J. May 6, 1929.

This is an action to declare appellant a trustee of real estate by reason of a conveyance executed by one of the appellees to appellant. The question of fraudulent intent being one of fact and the trial court having failed to find that appellant had fraudulent intent, the conveyance cannot be held fraudulent as to creditors. In this state it is settled "that an embarrassed or insolvent debtor may lawfully prefer one or more of his creditors by payment, mortgage, pledge or deed, in exclusion of the others. No statute forbids such preferences; no rule of law is understood to prevent them. The fact that the person whose debt is so preferred is a wife or other near relative does not affct the validity of such preference." (See opinion for authorities.)

13394 MAGEE v. INDIANA BUSINESS COLLEGE. Cass County. *Reversed.* Lockyear, J. May 28, 1929.

This is an action by the appellant against the appellee to collect rent. The appellee became a tenant of the appellant under a lease for a term of five years with the privilege of another term of five years on condition that the parties agreed upon the rental for said premises. Judgment reversed with the direction that "if the jury should find from the evidence that there was an agreement between the appellant and the appellee on the rental, then a new term of five years was created; if the jury should find that they had not agreed upon the rental but the appellee remained in possession and paid the $50 per month therefor, a tenancy from year to year was thereby created, under the law *then* existing."

13663 MCSWAIN v. STATE. Vanderburgh County. *Affirmed.* Neal, J. May 10, 1929.

Appellant was found guilty of maintaining a liquor nuisance. There was sufficient evidence to support the verdict unless the court erred in permitting, over the objection of the appellant, the officers to testify what was seized by them and what they observed on the premises of the appellant while in the act of executing a search warrant. No motion to suppress the evidence obtained by the officers on the ground of an alleged illegal search was made in advance of the trial of the case. On the authority of *Hantz v. State* it was not incumbent upon the court, under the facts in this case, to pause in the midst of the trial to determine the competency of the evidence offered by the state upon the objection interposed by appellant.

13419 NASH ET AL v. STATE EX REL ADAMS. Parke County. *Reversed.* Lockyear, J. May 8, 1929.

This action was to recover damages on a township trustee's bond, by a landowner, based on the negligent failure of the township trustee to

clean out and open a non-dredge ditch. The Act of 1917 "concerning the repair of drains" impliedly repealed the act of 1915 "concerning the maintenance and repair of all ditches and drains, "etc. Under the Act of 1917 the defendant township trustee was under no duty to proceed with the cleaning of the ditches in his township until the township trustee in the adjoining township had cleaned the lower part of the ditch in his township.

13345 POSTLEWAITE ET AL v. HASSE. Porter County. On Petition to Transfer. *Petition denied.* Nichols, J. May 17, 1929.

In reply to a question of the presiding justice, at the commencement of the oral argument in this cause, counsel for appellee stated "that there was no constitutional question involved; that if the court construed Sec. 152 as being state-wide in character, there could be no constitutional question." The court having proceeded to hear oral argument and to decide the appeal, construing such Sec. 152 as state-wide, appellee may not now present the constitutional question.

13594 REESE v. STATE. Delaware County. *Affirmed.* Enloe, J. May 28, 1929.

"Being intoxicated in a public place" and "operating an automobile upon a public highway while in a state of intoxication" are, "under our statute, separate and distinct offenses and a conviction of one is no bar of conviction for the other." The court erred in instructing the jury that imprisonment was mandatory if the jury found the appellant guilty, since under Sec. 40, Ch. 213, Acts 1925 imprisonment is discretionary. The court reverses the judgment as to the imprisonment part thereof and also as to the prohibition against the appellant's driving an automobile for the space of six months.

13415 SCHROEDER v. SCHROEDER. Vanderburgh County. *Reversed.* Nichols, J. May 17, 1929.

Action by appellee against appellant for divorce. The appellee did not file a brief and the court says the evidence, as it appears in appellant's brief, is insufficient to sustain the decision of the court.

13667 SEIBERT v. STATE. Vanderburgh County. *Affirmed.* McMahan, P. J. May 10, 1929.

Appellant was convicted on the charge of drawing and of threatening to use, while drawn, a dangerous weapon. A determination of the questions so attempted to be presented calls for a consideration of the evidence but since there is no showing that the bill of exceptions, containing the evidence was ever filed in the clerk's office after it was signed by the judge, it follows that the evidence is not in the record. And consequently there is no error shown in the overruling of the motion for a new trial.

13552 SELF v. SHIRKIE COAL COMPANY. Industrial Board. *Reversed.* Lockyear, J. May 29, 1929.

This is an appeal from the Industrial Board presenting the question as to whether the accident arose out of and in the course of employment.

On the facts the Industrial Board erred in finding that appellant's injury did not arise out of and in the course of his employment.

13666 SHOCKLEY v. STATE. Marion County. *Affirmed.* Lockyear, J. May 28, 1929.

Appellant was tried and convicted under an affidavit charging the keeping of a gaming house. It was not reversible error for the court to allow the prosecuting attorney to state to the court, at the time when the court was about to pronounce sentence, that the appellant had been convicted of other crimes, even though the accused had not taken the stand and there had been no evidence of previous conviction.

13684 SHORTER v. STATE. Clay County. *Affirmed.* Remy, J. May 8, 1929.

Appellant was convicted of the offense of operating a motor vehicle on the public highway while under the influence of intoxicating liquor. After an appeal to the circuit court from a decision of a justice of the peace or mayor of the city against a defendant who has entered appearance and pleaded in bar, it is too late to file a plea in abatement, unless the plea to the merits, by leave of court, has first been withdrawn. The testimony of arresting officers as to the defendant's condition at the time of the arrest was not rendered inadmissible by reason of the fact that the arrest was in violation of the statute. The court distinguishes from those cases, "where to receive the evidence would constitute a violation of the constitutional guaranties against unlawful search and seizure and compel a party to be witness against himself."

13682 STATE v. MCCOY. Vanderburgh County. *Affirmed.* McMahan, P. J. May 15, 1929.

Appellee was indicted by a grand jury for malconduct and misfeasance as city judge. Appellee filed a plea in abatement, the gist of which was that the directions and comments by the presiding judge to the grand jury were such as to improperly influence the grand jury. A demurrer by the state to the plea in abatement was overruled. The court says that appellee was practically denied his constitutional rights to a hearing before a fair and impartial jury and that there was no error in overruling the demurrer to the plea in abatement.

13683 STATE v. MCCOY. Vanderburgh County. *Affirmed.* Neal, J. May 15, 1929.

Affirmed on authority of *State of Indiana v. McCoy,* No. 13682, this term.

13583 STRATHMANN v. STATE. Marion County. *Affirmed.* Lockyear, J. May 10, 1929.

Appellant was convicted on the charge of violation of the prohibition law. The trial court sustained a demurrer to appellant's plea in abatement. It set out in substance that he had been previously arrested under an affidavit containing charges identical with the charges contained in the instant indictment and that he had appeared in the city court to answer said charges; that a motion to quash the said warrant and dismiss the

affidavit was sustained. The court says this present action is a new and independent one and the action of the city court or what was done in the city court has no bearing on the proceedings in the Marion Criminal Court and is not sufficient to abate this action. The evidence was sufficient to support the verdict unless it was error to permit certain witnesses to testify. In the present action the "brief does not show any grounds upon which a single objection was made to the introduction of evidence offered in this case and no motion was filed in Marion Criminal Court to suppress any evidence."

13363 TICHENOR ET AL. v. HARBISON ET AL. Gibson County. *Affirmed.* Nichols, J. May 20, 1929.

Action by appellees against appellants for restraining order and for damages by reason of the alleged wrongful discharge, into a natural water course, by overflows of mineral and salt water from certain oil wells, etc. There was no error in overruling appellant's demurred to the complaint, nor in overruling appellant's motion for a new tiral, the finding as to damages herein being well within the amount proven by the evidence.

12749 UHRIG v. HANKE CAR CO. DeKalb County. *Affirmed.* Remy, P. J. May 31, 1929.

Action by appellant against appellee to recover for personal injuries alleged to have been sustained by appellant as a result of negligence in the operation of an automobile by an agent of the appellee. There was no error in directing a verdict for the appellee on the ground that the agent of appellee who was operating the car was not, at the time, acting within the scope of his employment.

13678 VARNER v. STATE. Hancock County. *Affirmed.* Neal, J. May 8, 1929.

Appellant was convicted on the charge of the unlawful selling of intoxicating liquor. The allegation that the defendant sold intoxicating liquor to the prosecuting witness was supported by proof of an "offer to buy, the acceptance of the same and the delivery," even though another person paid for the liquor. A witness who is familiar with intoxicating liquor may testify from his sense of smell that certain liquor is whisky. Under the rule that jurors cannot impeach their own verdict the appellant cannot support his motion for a new trial by affidavits of two of the jurors setting out expressions of a particular juror made while the jury was deliberating upon its verdict, even though the appellant is proceeding on the theory that the expressions of the particular juror are being shown for the purpose of disclosing that the juror misrepresented and concealed material facts upon an examination concerning his qualifications to act as a juror.

13382 WARD BROTHERS CO., INC. v. ZIMMERMAN, ADMRX. Lake County. *Reversed.* Remy, J. May 16, 1929.

Action by appellee, as administratrix of the estate of her deceased husband, to recover damages for his death alleged to have been caused by

appellant's negligence. When instructions given and those tendered are brought into the record by special bills of exceptions, it is not necessary to comply with Sec. 584 Burns 1926 and Sec. 586 Burns 1926, "for there is no way of establishing verity which is superior to a bill of exceptions. Although by statute (Acts 1925 p. 594) a speed greater than 35 miles per hour is made *prima facie* negligence, it does not follow that a speed of less than 35 miles an hour is prima facie not negligence, and it was not error to refuse to so instruct. It was reversible error for the court to state "a violation of this statute is made a crime against the state, and any violation of this statute is negligence," in view of the fact that one reason assigned and properly presented for a new trial is "excessive damages" and the court says it has "no means of knowing from the record, that the jury was not influenced to award a larger sum because of the instruction."

13409 WOODS V. KOGA ET AL. Vanderburgh County. *Affirmed.* McMahan, P. J. May 31, 1929.

Appellees recover judgment against appellant on account of alleged fraud in the exchange of real estate. The only questions attempted to be presented by appellant relate to the failure of the court to indicate, before instructing the jury, by memoranda in writing, the instructions requested by appellant and also by appellees, the number of the instructions so requested which would be given and which would be refused, and the failure of the court to sign such memoranda. See opinion for full discussion of the question.

13728 YECKERING V. STATE. Vanderburgh County. *Affirmed.* McMahan, P. J. May 14, 1929.

Appellant was tried by the court without a jury and convicted of petit larceny. In support of the motion for a new trial the appellant claimed the finding of the court was not sustained by sufficient evidence. It was not error to overrule the motion for new trial. The Appellate court, in determining whether the evidence is sufficient to sustain the finding of the court and the verdict of the jury will consider only that evidence which is favorable to the prevailing party and the court says the evidence is sufficient to support the finding.